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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARIO ALBERTO VALENZUELA, Defendant and Appellant.	B287555 (Los Angeles County Super. Ct. No. MA065096)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed in part, reversed in part and remanded for resentencing.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Kristen J. Inberg, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Mario Alberto Valenzuela of two counts of attempted premeditated murder and one count each of assault by a prisoner serving a life sentence, assault by means of force likely to produce great bodily injury and battery causing serious bodily injury. On appeal Valenzuela contends the court improperly answered the jury's question regarding willful intent. Valenzuela also argues his conviction for assault must be reversed because it is a lesser included offense of assault by a life prisoner and remand for resentencing is necessary to allow the trial court to exercise its discretion under new law, effective January 1, 2019, to strike or dismiss the prior serious felony convictions for sentencing purposes. We reverse the conviction for aggravated assault, remand for resentencing and in all other respects affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

An amended information charged Valenzuela with two counts of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664)[1] (counts 1 and 2), assault by a life prisoner (§ 4500) (count 3), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) (count 4) and battery causing serious bodily injury (§ 243, subd. (d)) (count 5). Count 1 arose from a 2014 attack on Sesar Carillo, and counts 2 through 5 related to a 2015 attack on Jon Ruccini. As to counts 1 through 4 it was specially alleged Valenzuela had personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The amended information also specially alleged Valenzuela had suffered six

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[1] Statutory references are to this code.

prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and three serious felony convictions for purposes of section 667, subdivision (a).

2. *Evidence at Trial*

During the relevant period Valenzuela was serving a maximum life sentence in state prison. He was housed in the administrative segregation unit at Lancaster State Prison where inmates are placed for a variety of reasons, including a mental health designation, problematic behavior or safety concerns. At the time of the 2015 incident Valenzuela was housed in the mental health block of the administrative segregation unit.

a. *The attack on Sesar Carillo*

On January 19, 2014 correctional officer Clarence Kehres was conducting a routine security check of the administrative segregation unit when he heard a loud noise he thought was an inmate banging on the door of his cell. He looked toward the noise but did not see anything out of the ordinary. Approximately 15 to 20 seconds later he heard a second loud bang but still did not see anything unusual. One minute later, as he continued his security check, he arrived at Valenzuela's cell. Kehres observed Valenzuela's cellmate, Sesar Carillo, on his knees and Valenzuela "behind [Carillo] with his right knee in the middle of [Carillo's] back and a rope in each hand, what appeared to be a rope, and pushing forward with his knee, leaning back with both hands and pulling, attempting to strangle [Carillo]." Valenzuela ceased the attack as Kehres entered the cell. Kehres testified Carillo lay motionless on the floor. Kehres examined the object Valenzuela had been holding and identified it as a torn sheet that had been tightly twisted into a rope.

Correctional Sergeant Kenneth Marshall arrived at the cell shortly after the incident. Carillo had been removed from the cell. He was shaken and complained of neck pain. Marshall testified Valenzuela had no visible injuries and appeared calm. William Jones, a registered nurse employed at the prison, also arrived at the cell shortly after the attack. Carillo told Jones that Valenzuela had tried to choke him while he was sleeping. Jones testified Carillo seemed calm but complained of severe neck pain. Jones also observed some redness on the front of Carillo's neck. Jones placed a cervical collar on Carillo and transferred him to a hard stretcher. Carillo was taken to the hospital for further evaluation.

b. *The attack on Jon Ruccini*

On June 1, 2015 Correctional Officer Scott Mason escorted inmate Jon Ruccini to his cell after a mental health group meeting. Ruccini was restrained at the waist because he had shoulder problems that prevented him from putting his arms behind his back. Ruccini had other medical problems that caused him to move slowly. He was housed on the bottom level because he could not climb stairs, and he was permitted to wear special orthopedic shoes. Mason testified Ruccini was short, "pudgy" and much smaller than Valenzuela. Ruccini was housed in a cell with no cellmate.

Upon arriving at Ruccini's cell, Mason looked inside to ensure it was safe for Ruccini to enter. The cell was very dark because Ruccini had hung sheets over the light fixture and covered the window with cardboard. After determining to the best of his ability that it was safe, Mason placed Ruccini in the cell, removed his restraints and chatted with him for about 30 seconds. He then walked down the hall and stopped to talk to

another inmate. While having that conversation, Mason heard screaming from Ruccini's cell. He testified it was "loud screaming, very loud, and the cell door busting back and forth like a giant earthquake. . . . [A] life-threatening scream. Very particular type of scream that I haven't heard before." He recognized the voice as Ruccini's.

Mason returned to Ruccini's cell and saw Valenzuela inside kicking Ruccini, who was curled up on the ground. Valenzuela had one arm on the bed and another on the desk, "and he was using both items so he could get up in the air and swing kick at inmate Ruccini in a swinging motion, probably to give more—more of a better kick because the cells are kind of small." Mason yelled at Valenzuela to stop, but he did not. Mason initially testified Valenzuela continued to kick Ruccini every few seconds for one to two minutes. However, on cross-examination Mason clarified he witnessed Valenzuela kick Ruccini only two to four times and may have misunderstood the question during his earlier testimony. When Valenzuela eventually ceased the attack, Mason observed Ruccini was unresponsive and had bruising on his upper body and head and cuts on his head. Ruccini's medical records were admitted into evidence; they stated Ruccini had sustained a facial fracture during the attack and needed 18 stitches for facial lacerations.

Correctional Lieutenant Karla Graves testified she arrived at Ruccini's cell shortly after the attack. She observed Ruccini sitting on the ground with his head against the door. Valenzuela was leaning against the desk calmly and had some scratches on his hands. Ruccini had cuts on his face and head, which were covered in blood. Based on her experience Graves believed the cuts had been made by a razor blade. She directed two officers to

search Valenzuela. They did not recover a razor blade, but Valenzuela refused to open his mouth for the search. After Valenzuela had been given his dinner tray, Graves ordered the officers on duty to search the tray when Valenzuela was done with it. However, the tray was never searched.

Graves testified the incident reports from the attack identified Ruccini as a member of the Nazi Low Rider gang and Valenzuela as a dropout of the Serranos gang. Graves explained that entry in the reports was populated by a central prison system. She said she was not aware of any conflict between Valenzuela and Ruccini during the year she had been assigned to the prison. She also repeatedly stated inmates in the mental health unit were not focused on their gang status but instead concentrated on their treatment and their placement in the mental health program.

c. *Valenzuela's defense*

Sarah Parhami, a staff psychologist in the administrative segregation unit, testified as a defense witness. Parhami conducted group therapy sessions with the inmates. She testified inmates are generally aware of each other's gang affiliations or former affiliations and that affiliation appears to be significant to them. Richard Subia, a retired prison warden and correctional administrator who had worked for 26 years for the California Department of Corrections, also testified as a defense witness that prisoners in administrative segregation units, including mental health units, are aware of each other's gang affiliations and find that information to be important. Subia also opined there had been multiple violations of security protocol relating to the attack on Ruccini, including allowing Valenzuela to enter the

wrong cell, not intervening in the altercation sooner and failing to adequately search Valenzuela after the incident.

3. *The Verdict and Sentence*

Valenzuela was convicted on all counts, and the jury found true the special allegations that the attempted murders had been committed willfully, deliberately and with premeditation. The jury also found true the great bodily injury enhancements to counts 1 through 4. Following the jury's verdict Valenzuela admitted each of the prior serious felony conviction allegations. The court sentenced Valenzuela as a third strike offender to an aggregate indeterminate state prison term of 88 years to life on counts 1 and 3.[2] Sentence on the remaining three counts was stayed pursuant to section 654.

DISCUSSION

1. *The Trial Court's Answer to the Jury's Question Regarding Duress Was Not an Abuse of Discretion*

a. *Relevant proceedings*

In his closing argument defense counsel contended Valenzuela had not acted with the specific intent necessary to

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[2] Valenzuela was sentenced on count 1 to an indeterminate term of 25 years to life for attempted willful, deliberate and premeditated murder, plus consecutive determinate terms of three years for the great bodily injury enhancement and five years for each of the three prior serious felony convictions. He was sentenced on count 3 to a consecutive indeterminate term of 27 years to life for assault by a life prisoner, plus consecutive determinate terms of three years for the great bodily injury enhancement and five years for each of the three prior serious felony convictions.

attempt willful, deliberate and premeditated murder. Defense counsel argued there was no evidence as to who had started either altercation and suggested the attacks could have been the result of a spontaneous dispute. Counsel further posited Valenzuela had not purposefully hidden in Ruccini's cell to attack him but may have been placed in the cell involuntarily. Despite these arguments counsel did not request jury instructions regarding self-defense or duress.

During deliberations the jury asked the court, "Does under duress negate or nullify willful intent?" Defense counsel requested the court respond by giving the jury the legal definition of duress and explaining it is a legal defense to the specific intent element of attempted premeditated murder. Counsel argued, "If this jury believes that the circumstantial evidence creates a reasonable inference of duress, then I don't think we can step into their shoes and consider that an impermissible inference." The court disagreed, explaining, the "common, everyday usage [of the term duress] is very different from the legal definition, which is very, very specific. . . . With regard to giving an instruction on duress, the issue is that there was absolutely no evidence whatsoever that would support the giving of such an instruction. There was no evidence to support a legal defense of duress. And the court does not believe it would be appropriate to give an instruction for which there is no evidence whatsoever."

The court answered the jury's question by stating, "You may consider all of the evidence presented at trial in determining whether the People have prove[d] the required intent for each crime and allegation. Please refer back to the instructions given regarding the required intent for each crime and allegation."

b. *Governing law and standard of review*

Section 1138 provides, "After the jury have retired for deliberation . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." The Supreme Court has explained, "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97; accord, *People v. Cleveland* (2004) 32 Cal.4th 704, 755; see *People v. Smithey* (1999) 20 Cal.4th 936, 984-985 [a trial court may satisfy its duty to respond to the jury's question by referring it to instructions already given if those instructions are full and complete and adequately answer the jury's question on the facts of the case].)

We review the trial court's response to the deliberating jury's questions for abuse of discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 745-746 ["[a]n appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury"]; *People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.)

c. *The trial court did not err by refusing to give an instruction on duress*

Valenzuela contends that, by refusing to give an instruction on duress, the trial court "precluded [the jury] from properly analyzing appellant's theory of the case that appellant did not have the requisite intent." This argument misstates the record. While defense counsel suggested Valenzuela may have acted in self-defense or may have been placed in a precarious situation involuntarily, there was no suggestion at trial that Valenzuela had acted under duress, which, as the trial court correctly observed, has a specific legal definition.

"Penal Code section 26 declares duress to be a perfect defense against criminal charges when the person charged 'committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 289-290.) While it is not clear a defense of duress could negate the specific intent element of attempted premeditated murder,[3] even if the defense were

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[3] In *People v. Anderson* (2002) 28 Cal.4th 767 the Supreme Court held that "duress is not a defense to any form of murder," nor does it reduce murder to manslaughter. (*Id.* at pp. 770, 780-784.) The Court reasoned, in part, that if duress were recognized as a defense "to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense to any form of murder would thus encourage killing." (*Id.* at pp. 777-778.) *Anderson* was reaffirmed in *People v. Vieira*, *supra*,

otherwise available, there is no evidence in this record supporting an inference Valenzuela had been threatened or pressured to attack Carillo or Ruccini. Accordingly, the trial court had no duty to instruct the jury on duress. (See *People v. Powell* (2018) 6 Cal.5th 136, 164-165 [duress instruction properly refused when evidence insufficient to support inference of threat of immediate harm].) The jury's question regarding duress (for which they did not have the legal definition) did not spontaneously create the potential for the defense where it had not previously existed. The instructions given to the jury were a complete and accurate statement of the law, and the trial court's answer to the jury's question and referral to the original instructions was a proper exercise of its discretion.

2. *The Conviction for Assault by Means of Force Likely To Produce Great Bodily Injury (Count 4) Must Be Reversed*

Valenzuela asserts, and the Attorney General concedes, that assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) is a lesser included offense of assault by a life prisoner (§ 4500). (Cf. *People v. Milward* (2011) 52 Cal.4th 580, 588-589 [assault with a deadly weapon (§ 245,

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35 Cal.4th at p. 290: "We decline defendant's invitation to reconsider the holding in *Anderson*. Moreover, because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first-degree murder, we further reject defendant's argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder." Arguably the rationales of *Anderson* and *Vieira* would preclude duress as a defense to attempted first degree murder. However, the Supreme Court has not addressed the issue.

subd. (a)(1)) is a lesser included offense of assault by a life prisoner (§ 4500)].) Accordingly, the conviction on count 4 must be reversed. (See *People v. Sanders* (2012) 55 Cal.4th 731, 736 ["[w]hen a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed"]; *Milward*, at p. 589 [same].)

3. *A Limited Remand Is Appropriate for the Court To Consider Whether To Strike the Section 667, Subdivision (a), Enhancements*

At the time Valenzuela was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss the section 667, subdivision (a), serious felony enhancements. (See Stats. 2018, ch. 1013, §§ 1 & 2.) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a), enhancements.

DISPOSITION

The conviction for assault by means of force likely to produce great bodily injury (count 4) is reversed. The convictions are otherwise affirmed, and the matter remanded for the trial court to consider whether to strike the prior serious felony enhancements under section 667, subdivision (a).

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.